The complaint alleged that Congress had breached that contract through the enactment of FIRREA. *Id.* at 127a. In response, the government acknowledged that the Assistance Agreement was an express contract between FSLIC and SoCal and SCH permitting SoCal to include the $217.5 million capital credit in its regulatory capital. The government denied, however, that petitioners had standing to enforce that promise, because they were not parties to the Assistance Agreement. See *id.* at 8a.

The Court of Federal Claims granted the plaintiffs' motions for summary judgment on liability. With respect to petitioners, the court concluded that the Assistance Agreement's Entire Agreement clause incorporated the RCMA and the FHLBB resolutions authorizing the transmittal of the Forbearance Letter which, in turn, authorized the inclusion of goodwill (including the capital credit) in the calculation of SoCal's regulatory capital. Pet. App. 146a. The trial court further held that the Entire Agreement clause rendered "unenforceable" the Assistance Agreement's Sole Benefit clause, to the extent the latter clause would exclude petitioners as parties. *Id.* at 145a. The court concluded that, although petitioners had not signed and were not parties to the Assistance Agreement itself, they were parties to what the court characterized as an "overall" agreement that encompassed the terms of the Assistance Agreement, the RCMA, and the FHLBB resolutions/Forbearance Letter adopted in connection with the transaction. *Id.* at 146a, 149a.

After a trial on damages, the trial court awarded over $90 million to petitioners based upon a "dilution theory." The court accepted that, in the absence of the breach, the 1992 and 1995 recapitalizations would not

have occurred, and petitioners would have continued to possess their shares. The court therefore held that petitioners are entitled to the value of the shares they would have possessed in 1998. Pet. App. 106a-111a, 123a. The court also awarded $65.4 million in damages to SCH and SoCal. *Id.* at 123a.

5. On appeal, the Federal Circuit affirmed in part and reversed in part the trial court's award of damages to SCH and SoCal. Pet. App. 22a-27a. No party has sought further review of that decision. In the ruling at issue here, the court of appeals reversed the award of damages to petitioners. *Id.* at 27a.

The court held that the trial court had erred in concluding that the government had entered into an "overall" contract to which petitioners were parties, with the government's promises regarding the treatment of capital credits and supervisory goodwill running to all of the parties, thereby according standing to petitioners to recover damages for a breach. Pet. App. 10a-19a. The court of appeals found that conclusion to be contrary to the plain terms of the Assistance Agreement, to which SCH and SoCal were parties, but petitioners, as shareholders of SCH, were not. *Id.* at 11a-14a. The court noted in particular that the Sole Benefit clause of the Assistance Agreement excludes non-parties, such as petitioners, from the benefits of the Assistance Agreement, and that the trial court's conclusion to the contrary concededly made the Sole Benefit clause "unenforceable." *Id.* at 12a; see *id.* at 146a.

The court of appeals further held that the trial court had erred in concluding that the Entire Agreement clause required that petitioners be accorded the benefits of the Assistance Agreement notwithstanding their express exclusion under the terms of the Sole Benefit

clause. The court noted that the Entire Agreement clause of the Assistance Agreement by its terms incorporated the FHLBB resolutions, the Forbearance Letter, and other "interpretations or understandings agreed to in writing by the parties." Pet. App. 13a. The court held, however, that the RCMA was not one of the types of documents incorporated into the Assistance Agreement, because it was neither an FHLBB resolution nor an "interpretation[] or understanding[] agreed to in writing by the parties" to the Assistance Agreement. *Ibid.* Rather, the court explained, the RCMA "is a separate contract that involves additional parties and distinct promises, including its own Entire Agreement clause." *Ibid.* Thus, the court concluded, "the plain language of the Sole Benefit clause and the Entire Agreement clause evidences the parties' intent to limit the scope of the Assistance Agreement to its specified terms." *Ibid.*

The court of appeals noted that the trial court had relied upon petitioners' participation, as shareholders, in the conversion and acquisition process to hold that the petitioners were parties to an "overall" contract based on the Assistance Agreement. Pet. App. 15a. The court explained, however, that petitioners' participation in the process does not show that they became parties to the Assistance Agreement or a broader, "overall" agreement, because of the well-settled principle "that a corporation is generally considered to be a separate legal entity from its shareholders." *Ibid.* Under the Assistance Agreement, the law of California was to govern its construction, and the court explained that California law would plainly treat the corporations as separate entities from their shareholders in the circumstances of this case. *Id.* at 15a-16a. In short, "[h]aving chosen to limit

their personal liability by adopting a corporate form" with all of its advantages of limited liability, petitioners could not "rely on their involvement in the negotiation process or their role in funding a transaction to alter their chosen legal status" and be treated as the real contracting parties when it suited their interests. *Id.* at 17a.

The Federal Circuit then considered whether the much more limited RCMA, to which petitioners *were* parties, entitled petitioners to recover damages. Pet. App. 19a-22a. The court noted that the trial court itself did not find that petitioners' status as signatories to the RCMA was sufficient to allow them to recover damages. *Id.* at 15a n.4. In analyzing the RCMA, the court of appeals noted that the RCMA contained references to the capital credit (but not to goodwill). *Id.* at 19a-20a. Assuming, but not deciding, that the government had breached the RCMA, *id.* at 20a, the court determined that petitioners were not entitled to damages for dilution of their ownership interest in SCH and SoCal, because petitioners' relinquishment of their equity was neither caused by, nor a foreseeable result of, any alleged breach of the RCMA. *Id.* at 20a-21a.

Judge Mayer dissented in part. Pet. App. 28a-30a. He would have affirmed the trial court's conclusion that "[t]he combined content of the [RCMA], the Assistance Agreement, and the [FHLBB] implementing resolutions * * * proves that [petitioners] entered into an overall contract with the government." *Id.* at 28a. In his view, that "overall contract" gave petitioners "standing to enforce both the capital credit and the supervisory goodwill promises of the government." *Id.* at 30a. Judge Mayer did not disagree with the court's conclusion that

petitioners had no right to damages based upon a breach of the narrower RCMA itself.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. The narrow issues decided by the court of appeals concerning the construction of the particular documents in this case and the causation and foreseeability of petitioners' alleged damages by the alleged breach do not warrant further review.

1. Petitioners do not challenge the court of appeals' conclusion that the trial court erred in finding a broad, overall agreement based on the Assistance Agreement, incorporating the FHLBB Resolutions and Forbearance Letter, and including the RCMA as well. Nor do petitioners challenge the court of appeals' articulation, see Pet. App. 20a-21a, of the general rules governing contract damages under an expectation, reliance, or restitution theory, including the court's recitation of the ordinary causation and foreseeability requirements for expectation damages. See Pet. 20. Petitioners' sole challenge is to the application of those general standards to the particular contract and the particular transaction in this case. Further review of that fact-based claim is not warranted. In any event, the court of appeals correctly held that petitioners are not entitled to damages for breach of the RCMA.

a. The plain terms of the RCMA make clear that it did not include a promise by the government to permit SoCal to include the $217.5 million capital credit in its regulatory capital for federal regulatory purposes. Without such a promise, petitioners' claim for damages must be rejected.

As discussed above, Section 1 of the RCMA by its terms embodied a promise by SCH and SoCal that they would "cause" SoCal to satisfy what Secton 1 termed the "Required Regulatory Capital" level, *i.e.*, the level required by federal regulations. Pet. App. 181a-182a. Section 1 then stated two qualifications on that promise by SCH and SoCal, each introduced with a "provided that" clause. *Id.* at 182a. Under the second "provided that" clause, SCH and SoCal would cause SoCal to satisfy the Required Regulatory Capital level, "*provided further* that * * * the $217.5 million of assistance from the CORPORATION [*i.e.*, the so-called "capital credit"] shall be includable in capital for purposes of determining whether [SoCal] has maintained its regulatory capital at the Required Regulatory Capital level." *Ibid.*; see note 2, *supra*. Accordingly, SCH and SoCal would have an obligation under the RCMA to ensure compliance with the Required Regulatory Capital level *provided that* the $217.5 million cash infusion was includable in capital for purposes of the calculation. Because the government's commitment regarding the capital credit was introduced in a "provided that" clause, it was merely a condition on the performance of SCH and SoCal. The language of Section 1—which was written as a condition on the perofrmance by SCH and SoCal, not as an affirmative undertaking by FSLIC—thus makes clear that the government was not making a more general, affirmative commitment in the RCMA about how SoCal's capital would be calculated or regulated for other purposes. While such a more general commitment was made to SCH and SoCal (but *not* to petitioners) in the Assistance Agreement, see pp. 14-15, *infra*, it was not included in the RCMA.

Section 2 reinforced that conclusion. Under Section 2, "[f]or purposes of this Agreement, any computation of [SoCal's] Required Regulatory Capital shall be as determined by," *inter alia*, "the second proviso of § 1," *i.e.*, the $217.5 million "includable in capital" proviso. Pet. App. 182a-183a. Section 2 thus made clear that the $217.5 million "includable in capital" proviso was to be controlling solely "[f]or purposes of this Agreement," *i.e.*, for purposes of determining whether SCH and SoCal would have to perform their contractual commitment in the RCMA to maintain SoCal's capital at a certain level. The proviso was to have no further force in, for example, calculating SoCal's compliance with regulatory or statutory capital standards for thrifts more generally, or the liability of the government for breach of any promises FSLIC may have made to SCH or SoCal in some other agreement.

The above promises made by SCH and SoCal in Section 1 of the RCMA are relevant to petitioners solely by virtue of Section 4 of the RCMA. Section 4 states that, "so long as [SCH] shall be obligated pursuant to § 1," petitioners "guarantee the performance of [SCH] and [SoCal] under § 1," subject to petitioners' maximum obligation in the aggregate of $5 million. Pet. App. 183a. Because *SCH and SoCal* have contractual obligations under Section 1 to maintain capital levels only if the $217.5 million "includable in capital" proviso in that section is satisfied, Section 4 similarly limits *petitioners'* obligations as guarantors of SCH and SoCal to circumstances in which the $217.5 million "includable in capital" proviso is satisfied. Neither Section 4 nor any other portion of the RCMA, however, includes or suggests a government promise to SCH or SoCal, much less to petitioners, to permit SoCal to treat the capital credit in any

particular way for purposes other than determining the obligations of SCH and SoCal—and the derivative obligations of petitioners as guarantors of the performance of SCH and SoCal—under Section 1 of the RCMA.

To be sure, a more general promise committing the government to calculate SoCal's capital in a particular way for federal regulatory purposes was made in the Assistance Agreement, to which petitioners were not parties. The terms of that promise may usefully be contrasted with the RCMA. Under the Assistance Agreement, the government agreed that "[f]or purposes of reports to the Bank Board, the [capital credit] shall be credited to [SoCal's] regulatory capital account and shall constitute regulatory capital." C.A. App. A400755; see note 1, *supra*. Had the parties desired in the RCMA to include an affirmative promise by the government to permit the capital credit to constitute regulatory capital generally under the applicable federal regulations, the parties thus had a readily available model to achieve that end. The RCMA, however, was directed to a different and more limited purpose—*i.e.*, establishing the obligation of SCH and SoCal, as corporations, to maintain the regulatory capital of SoCal, subject to certain conditions. And the purpose of Section 4 of the RCMA was also different and far more limited still—to obtain the personal guarantee of petitioners, as individual shareholders of SCH, for the performance by SCH and SoCal of their conditional obligations under Section 1. Furthermore, even that guarantee was capped at $5 million. Accordingly, petitioners did not obtain—and the government did not agree to—a general contractual commitment *to petitioners* that the capital credit would constitute regulatory capital of SoCal for purposes of deter-

mining compliance with federal banking regulations.[4] Indeed, it is exceedingly unlikely that the government would have exposed itself to the sort of broad liability petitioners assert in this case in exchange for a conditional guarantee capped at $5 million.

b. With the terms of the RCMA in mind, petitioners' damages claim can be analyzed. The court of appeals correctly rejected petitioners' claim "that the incorporation of the capital credit promise into the terms of the RCMA is sufficient to uphold the Court of Federal Claims' award of damages." Pet. App. 20a. Because the treatment of the capital credit was only a condition on petitioners' performance of *their* obligation, there was no breach of the RCMA by the government when the condition that excused Sch and SoCal from performing occurred.

Put another way, as the court of appeals explained, "the damages for which [petitioners] seek to recover, namely the dilution and the extinguishment of their ownership interest in SCH, were not caused by the obli-

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[4] In the court of appeals, petitioners and the government focused almost all of their attention on whether there was an overall agreement to which petitioners were parties and which included not only the RCMA, but also the Assistance Agreement, the Bank Board Resolutions, and the Forbearance Letter. Only three pages in one of the two 59-page appellate briefs submitted by the two separate groups of petitioners mentioned the possibility of an asserted breach of the RCMA as a separate basis for liability. See C.A. Br. for Roy Doumani et al. 19-22. The parties' focus on the Assistance Agreement and Forbearance Letter is entirely explicable when the terms of the RCMA are examined, since those terms make clear that the RCMA did not include a general promise, as in the Assistance Agreement, that the capital credit "shall be credited to [SoCal's] regulatory capital account and shall constitute regulatory capital" for federal regulatory purposes. C.A. App. A400755.

gations they incurred in the RCMA." Pet. App. 20a. Indeed, as the court of appeals further noted, "[t]he RCMA did not require that the Individual Plaintiffs invest in SCH," but "[a]t the most, the RCMA obligated the Individual Plaintiffs to collectively contribute to SCH and SoCal an additional $5 million in the event that SCH and SoCal did not maintain SoCal's regulatory capital at the required level." *Ibid.* And petitioners in fact never even made that contribution. *Ibid.* Thus, because the government's only undertaking to petitioners in the RCMA was a "provided that" condition on petitioners' performance of their up-to-$5 million guarantee (which was in turn conditional on a failure by SCH and SoCal to fulfill their conditional undertakings as primary obligors under Section 1 of the RCMA)—and because petitioners never rendered that performance—the nonoccurrence of the condition that excused SCH and SoCal from their obligations under the RCMA could not have caused petitioners any damages under the RCMA, much less the damages they claimed for dilution of their ownership interest in SCH.

That holding was independently sufficient to dispose of petitioners' claims. Nonetheless, the court of appeals additionally went on to address the issue in terms of foreseeability and damages, concluding that, "even if [the court] assume[s] that the passage of FIRREA constituted a breach of the RCMA, [petitioners] are not entitled to recover the damages they seek." Pet. App. 20a. The damages petitioners seek are for dilution of their ownership interest in SCH and SoCal. From the beginning, however, petitioners (like all other shareholders of thrifts and holding companies) faced a risk that if the thrift needed more capital, SCH might issue more stock (and even cancel the old stock) to raise

money to infuse into the thrift. That risk would have existed even if the shareholders never entered into the RCMA. Thus, assuming there was a breach here, petitioners could prevail only if the RCMA shifted that particular risk—the risk that SCH would dilute petitioners' ownership interest in order to raise capital—from the shareholders to the government.

As noted above, the RCMA was directed to petitioners' obligation to invest *additional* funds in SCH, and the assurances petitioners sought regarding the conditions that would have to exist in order for that obligation to be triggered. Nothing in the RCMA addressed the more general risk that petitioners' pre-existing stock in SCH and SoCal would be diluted. As the court of appeals explained,"there are no terms in the RCMA that require [petitioners] to raise capital for SCH and SoCal by diluting their ownership interest in order to issue equity to new investors," but, "[a]t the most, the RCMA obligates [petitioners] to contribute an additional $5 million to the operation of SCH and SoCal." Pet. App. 21a. Accordingly, from the standpoint of the RCMA, a claim that petitioners lost a $5 million contribution required by the RCMA might have stated a claim for foreseeable damages up to that amount in certain circumstances, had petitioners ever made such a contribution. But a claim that petitioners' pre-existing stock was diluted was not within the scope of risks addressed by the RCMA, and any dilution of petitioners' stock was accordingly not foreseeable with respect to the RCMA. Accordingly, even if it is assumed, *arguendo*, that the change in regulatory capital requirements after FIRREA could be regarded as a breach of the RCMA, "[b]ased on the unambiguous terms of the RCMA, [petitioners'] loss of their ownership interests was neither

the foreseeable result of nor caused by the government's breach of the RCMA and therefore dilution damages cannot be awarded as a form of expectation damages." *Ibid.*

c. Petitioners argue that further review is warranted on the ground that the court of appeals minted a new, and unduly limited, rule of contract damages in this case. They contend that, "[a]lthough [the court of appeals] *recited* the usual foreseeability standard, the court rejected expectation damages as a matter of law by adding a novel limitation to that standard: that the contract itself must require the equity loss upon breach or the acquisition of the destroyed property in the first place." Pet. 16; see Pet. 19-20.

Petitioners are correct that the court of appeals recited the ordinary standards of causation and foreseeability for contract damages. But they err in asserting that the court otherwise added any "novel limitation" to those standards. Contrary to petitioners' contentions, the court of appeals never stated any general principle that expectation damages are awardable only if the contract "require[s] the equity loss upon breach" or if the contract requires "the acquisition of the destroyed property in the first place." Pet. 16. Rather, the court applied the general principles of causation and foreseeability to this particular contract, where the only possible deficiency was the alleged failure of a condition precedent to petitioners' own obligations. In those circumstances, any claim for damages by petitioners would have to flow from their performance of their own obligations; having negotiated a contract in which the government's obligation was merely a condition precedent to theirs, they cannot now obtain consequential damages

based on the proposition that the government made a general and unqualified promise.

Petitioners also argue (Pet. 21) that "the Federal Circuit nowhere questioned as a *factual* matter the trial-court finding that the loss of the 1987 equity was a foreseeable consequence of the Government's breach of its regulatory-capital contract." The trial court considered the RCMA, however, only as part of a broad, "overall" contract, a contract whose existence the court of appeals correctly rejected. See Pet. App. 10a-19a. Thus, the trial court never considered whether the petitioners' relinquishment of their equity was foreseeable as a result of an asserted breach of the RCMA standing alone. See *id.* at 15a n.4 ("It is noteworthy that the Court of Federal Claims did not find that the status of [petitioners] as signatories to the RCMA was sufficient to allow them to recover damages."). In any event, in light of the terms of the RCMA, no such finding would have been possible.

d. Finally, petitioners argue (Pet. 22-24) that the court of appeals' decision conflicts with its prior decisions in *Bluebonnet Savings Bank, FSB* v. *United States*, 266 F.3d 1348 (Fed. Cir. 2001), and *La Van* v. *United States*, 382 F.3d 1340 (Fed. Cir. 2004). Further review is not warranted to address a claim of an intra-circuit conflict. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, there is no such conflict.

In *Bluebonnet*, the shareholder obligated himself to infuse money into the thrift at specified intervals. Based upon the facts of that case, the trial court held, and the Federal Circuit affirmed, that it was foreseeable that a breach of the promises in a forbearance letter sent to the shareholder would interfere with the shareholder's

ability to raise capital. 266 F.3d at 1354. The damages sought in *Bluebonnet* arose from the alleged increased costs to the shareholder of making the required infusions after the breach. The alleged breach of the RCMA in this case arose in a completely different factual environment. Unlike in *Bluebonnet*, the contract in this case contained only a condition precedent to petitioners' performance, not an unqualified promise by the government. Moreover, unlike in *Bluebonnet*, the shareholders here did not actually infuse money into the thrift pursuant to the contract.

In the "fact-specific dispute" before the Federal Circuit in *La Van*, 382 F.3d at 1342, the trial court held that "the Government contracted with the Acquirors for * * * the amortization of the goodwill resulting from the [*Winstar*-type] transaction over thirty-five years." *Id.* at 1345. The court of appeals affirmed that conclusion. By contrast, the government entered into no such agreement with petitioners in the RCMA.[5] And just as in *La Van* the court of appeals held that "the standard for damages was the usual make-whole principle based on foreseeability," Pet. 24 (citing *La Van*, 382 F.3d at 1350-1351), the court of appeals in this case correctly held that "[e]xpectation damages are recoverable provided

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[5] Moreover, contrary to petitioners' assertion (Pet. 24), the court of appeals did not hold that the plaintiffs in LaVan were entitled to "expectation damages * * * for loss in value of their stock." Rather, the court noted the trial court's unappealed award of restitution for "the amount of the [plaintiffs'] initial investment," 382 F.3d at 1349, and held that "the trial court erred in denying [plaintiffs] the opportunity to present a case for expectancy damages," *id.* at 1350 (emphasis added). The court declined to decide whether the plaintiffs were entitled to expectation damages, instead "remand[ing] for the trial court to determine whether expectancy damages would be appropriate in the present case." *Ibid.*

they are actually foreseen or reasonably foreseeable, are caused by the breach of the promisor, and are proved with reasonable certainty." Pet. App. 20a-21a (quoting *Bluebonnet*, 266 F.3d at 1355).

2. Petitioners also argue (Pet. i, 27) that review should be granted to determine whether the Bank Board resolutions themselves "created contract rights for petitioners."

a. Initially, petitioners never argued to the court of appeals that the Bank Board resolutions themselves created contract rights, and the court of appeals never addressed that issue. Instead, prior to the petition for certiorari, petitioners contended that the FHLBB resolutions had been incorporated into the Assistance Agreement and that those resolutions—and, in particular, the Forbearance Letter to which they referred—created contractual rights on that basis. The court of appeals agreed that "[t]he Entire Agreement clause [in the Assistance Agreement] specifically incorporates * * * resolutions or letters from the FHLBB or the FSLIC." Pet. App. 13a. But the court held that the petitioners were not parties to the Assistance Agreement into which the resolutions had been incorporated—a holding that petitioners do not challenge. *Ibid.* The contention presented in the petition, that the resolutions alone created a contract with petitioners, is thus a new contention that this Court should not consider.

b. In any event, further review would not be warranted to address petitioner's highly case-specific contention that the Bank Board resolutions in this case created contractual rights in petitioners. By statute and regulation, petitioners needed various approvals by the Bank Board before they could consummate the transaction in which they acquired SoCal. Three Bank Board

resolutions granted those approvals. Resolution No. 87-514 approved the acquisition of SoCal's common stock by SCH, subject to any conditions that were imposed in a concurrent resolution. Pet. App. 223a. Resolution No. 87-511 noted the statutory and regulatory requirements for FHLBB approval of the conversion of SoCal to a stock organization, the acquisition of SoCal's stock by SCH, and the occupation of certain corporate offices by petitioners. *Id.* at 200a-201a. The resolution granted the requisite approvals subject to certain conditions, including (1) the execution of the Assistance Agreement by SoCal and SCH; (2) the execution of the RCMA by SoCal, SCH, and petitioners; (3) the execution of a Dividend Stipulation by SoCal and SCH; and (4) other stipulations and documents. *Id.* at 201a. The resolution also authorized the transmittal of the Forbearance Letter. *Id.* at 217a. The third resolution, No. 87-513, authorized FSLIC to execute and implement the Assistance Agreement, the RCMA, and other documents. *Id.* at 220a.

As petitioners acknowledge, "the requirements for a contract with the Government" include "mutual intent to contract." Pet. 29 (quoting *Massie* v. *United States*, 166 F.3d 1184, 1188 (Fed. Cir. 1999)). The Bank Board resolutions evidence no such mutual intent; they do not state that the Bank Board "agrees," "contracts," or "promises" to do anything. The resolutions are framed as exercises of federal regulatory authority, not contracts binding the government (and petitioners) and requiring payment of damages by the government (or petitioners) upon "breach" of the resolutions. Although the resolutions refer in various places to documents that are undoubtedly contractual (*i.e.*, the Assistance Agreement and the Regulatory Capital Maintenance Agreement), the resolutions do not incorporate those agreements; to

the contrary, the Resolutions distinguish between those contracts, which are referred to as "agreements," and other documents, which are termed "stipulations." See, *e.g.*, Pet. App. 207a. Moreover, the documents in this case were carefully structured so that one agreement (the Assistance Agreement) imposed obligations upon SCH and SoCal but not on petitioners, while another agreement (the RCMA) included petitioners. Having structured the transaction to take advantage of the separate identities of SoCal and SCH and the limited liability advantage offered by those separate identities, petitioners cannot now frustrate that structure by claiming that, by virtue of the Bank Board resolutions, the parties' efforts to distinguish between the corporations (SCH and SoCal) and petitioners as individuals who were shareholders of SCH, and to limit petitioners' obligations and rights, were entirely illusory.

To adopt petitioners' view that a request for and grant of regulatory approval forms a contract between the regulatory agency and regulated entity would conflict with long-settled principles of administrative law. As this Court explained in addressing an analogous situation in *National Railroad Passenger Corp.* v. *Atchison, Topeka & Santa Fe Railway*, 470 U.S. 451 (1985), "absent 'an adequate expression of an actual intent' of the State to bind itself, this Court simply will not lightly construe that which is undoubtedly a scheme of public regulation to be, in addition, a private contract to which the State is a party." *Id.* at 466-467 (citation omitted). *National Railroad Passenger Corp.* involved a claim that a statute, rather than a regulatory action, constituted a contract between the government and private entities. But the underlying rule in both instances is that "the principal function of a legislature [or regula-

tory agency] is not to make contracts, but to make laws that establish the policy of the state." *Id.* at 466. "Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws [or regulatory actions] as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative [or administrative] body." *Ibid.* To imply a contractual undertaking from a regulatory approval is impermissible, because in this case, as in *National Railroad Passenger Corp.*, "[t]he continued existence of a government would be of no great value, if, by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation." *Keefe* v. *Clark*, 322 U.S. 393, 397 (1944) (quoting *Charles River Bridge* v. *Warren Bridge*, 36 U.S. (11 Pet.) 420, 548 (1837)).

c. Contrary to petitioners' contention (Pet. 28), the decision below does not conflict with this Court's decision in *Winstar*. In *Winstar*, the plurality first concluded that an FHLBB resolution had been incorporated into the Supervisory Action Agreement (whose status as a contractual document was undisputed) by means of an integration clause. 518 U.S. at 862-863 (opinion of Souter, J). That conclusion was sufficient to establish that the terms of the contract were supplemented by the FHLBB resolution; the court of appeals in this case rejected the analogous conclusion with respect to the RCMA, and petitioners do not challenge that holding. Petitioners rely, however, on the plurality's added statement that "[t]o the extent that the integration clause leaves any ambiguity, the other courts that construed the documents found that the realities of the transaction favored reading those documents as contractual commit-

ments, not mere statements of policy, and we see no reason to disagree." *Id.* at 863 (citation omitted).

That alternative reasoning by the plurality, which was not addressed by the concurring Justices, was not necessary to the decision in *Winstar*. By its own terms, moreover, that reasoning is inapplicable here, because "the other courts" that construed the documents here did not find that they were contractual commitments; to the contrary, neither lower court expressly addressed whether the Bank Board resolutions alone were sufficient to form a contract. In any event, the facts of this case are fundamentally different from those in *Winstar*. Here, the parties plainly did provide in a contract (the Assistance Agreement) for the regulatory treatment of goodwill, and they also made quite clear that that agreement incorporated certain Bank Board resolutions. But, unlike in *Winstar*, the parties also decided not to include petitioners in that agreement. What petitioners seek in this case, unlike in *Winstar*, is to use the Bank Board resolutions to create additional contract rights for themselves, notwithstanding the fact that, at the time of contracting, the parties decided to grant those rights only to others.

d. Petitioners also argue (Pet. 28-29) that the decision of the court of appeals conflicts with other decisions of the Federal Circuit. Further review would not be warranted to address a claim of an intra-circuit conflict. *Wisniewski*, 353 U.S. at 902. Moreover, the court of appeals' decision could not conflict on this point with any of its prior decisions, because the court of appeals in this case did not address (because petitioners did not raise) the argument that the Bank Board resolutions alone constituted contracts between the government and petitioners.

In any event, even had the court of appeals held that the Bank Board resolutions were not contractual documents giving rights to petitioners, there would have been no intra-circuit conflict. Petitioners cite *Home Savings of America, FSB* v. *United States*, 399 F.3d 1341 (Fed. Cir. 2005). In *Home Savings*, the court of appeals held that although a parent company, Ahmanson, was not a party to the Assistance Agreements in that case, it was a party to overall contracts with the government pursuant to which its subsidiary, Home Savings, acquired several thrifts. *Id.* at 1349. Unlike in this case, the Bank Board resolutions in *Home Savings* conditioned approval of the transaction on a direct undertaking by Ahmanson to assume full financial responsibility for the thrift. See, *e.g.*, *Home Sav. of Am., FSB* v. *United States*, 51 Fed. Cl. 487, 498 (2002); see also 399 F.3d at 1349 (Bank Board resolutions memorialized "reciprocal promises that were part of the overall bargains between the plaintiffs and the government"). In this case, by contrast, the Bank Board resolution approving SCH's acquisition of SoCal mentions petitioners, see Pet. App. 197a-199a, but it does not impose direct obligations on them or condition approval of the acquisition upon reciprocal promises by them.

Petitioners also cite *La Van*. See Pet. 29. The court of appeals in this case specifically distinguished *La Van*, noting that "the shareholders [in *La Van*] were so critical to the conversion transaction that they, rather than the corporation, were essentially the direct purchasers of the converted federally-insured institution." Pet. App. 17a. The court also noted that the contractual documents in *La Van* had not identified the state law intended to govern the contracts in that case, and the court in *La Van* accordingly had no occasion to consider

the legal requirements under a particular state's law "mandating a distinction between a corporation and its shareholders." *Id.* at 18a; cf. *Domino's Pizza, Inc.* v. *McDonald*, 126 S. Ct. 1246 (2006) (emphasizing importance of distinction between corporation and its shareholders). In this case, by contrast, the parties provided in the Assistance Agreement that California law would govern the contract, and the court of appeals' analysis emphasized that under California law "there is no justification" to "disregard * * * the corporate structure invoked by [petitioners] facilitating the acquisition and conversion of [SoCal]." Pet. App. 17a. Finally, the court of appeals in *La Van* relied on specific evidence that the government intended to contract with the shareholders separately from the corporation in which they owned shares, such as internal deliberations, 382 F.3d at 1348, and an internal memorandum stating that "arm's length" negotiations were being conducted with the shareholder plaintiffs, *id.* at 1343. Here, in contrast, the facts show that any intent to reach an agreement with petitioners was confined to the terms contained in the RCMA.

In any event, the extent to which particular Bank Board resolutions constituted contracts between the thrift regulators, the banks, and their shareholders in the course of the 1980s is confined to the *Winstar* context. Only 30, out of the original total of approximately 122, *Winstar*-related cases are still pending. The question presented concerning the precise circumstances under which Bank Board regulations during the 1980s did—or did not—attain contractual status is one of limited future importance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

PRESTON MARTIN, ROY DOUMANI, BEVERLY W. THRALL (Successor to the Claims of Larry B. Thrall), ARBUR, INC., WILLIAM E. SIMON, JR., J. PETER SIMON, AND GEORGE J. GILLESPIE, III (Executors of the Estate of William E. Simon, Sr.),

Petitioners,

v.

UNITED STATES, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

There has been no change since the petition. *See* Pet. ii.

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REPLY BRIEF FOR PETITIONERS

The principal question presented is whether, when a party to a Government contract suffers a breach that causes factually foreseeable expectation damages (as the Federal Circuit accepted here). federal contract law nevertheless bars such damages unless the contract specifically provides for them. The Federal Circuit held that it does, engrafting a radical limitation, unsupported in any authority, on the entitlement to expectation damages. Because of the Federal Circuit's unique role in government contract law, its deviation from well-established standards and its own prior decisions on so fundamental an issue will cause serious harm until corrected.

The Government cannot defend the court's holding. It primarily seeks to avoid the issue by disputing the Federal Circuit's own (correct) premise that the Government breached its contract with petitioners. When the Government does discuss the actual ruling, it makes a simple and decisive error. It treats contract provisions that limit promisees' express obligations, and thus protect against their downside risk, as if they legally implied curtailment of their entitlement to the benefit of their bargain (their expected upside potential). That confusion of contract obligations with contract opportunities, aside from being illogical and unaccompanied by a single citation of authority, flouts the defining feature of contract damages—the guarantee of the "benefit of the bargain." The Federal Circuit's damages ruling is plainly wrong and should be reviewed and reversed.

The question whether the Board resolutions themselves created contract rights also warrants review. The Government is wrong in saying that petitioners failed to preserve this issue. On the merits, the Government has neither authority nor analysis to deny that financial-transaction-approving resolutions like the ones here create contract rights. Other Federal Circuit decisions plainly recognize such resolutions' enforceability as contracts, creating a conflict that warrants review.

A. The First Question Warrants Review

The Government incorrectly asserts that the petition's first question, about contract damages law, merely contests the application of settled law. Opp. 12. The Federal Circuit did not hold that, on the facts, petitioners failed to meet the accepted standard of factually foreseeable expectation damages; it did not even conduct a clear-error review of the trial court's factual finding of foreseeability (and *could not* have reversed that finding as a factual matter, as Pet. 21-22 explains). Rather, the court held that expectation damages could not, as a matter of law, include the breach-caused destruction of petitioners' property (their 1987 equity) simply because petitioners' *obligations* in the breached contract (the RCMA) did not include surrender (or initial acquisition) of that property. That is a legal ruling, and it is insupportable; indeed, its novelty is shown by the fact that the Government's entire argument on the merits (Opp. 12-20) is devoid of any citation to legal authority, whether precedent or the *Restatement*'s governing principles.[1]

1. The Government's main argument relies on what it recognizes was *not* the ground of the Federal Circuit's decision: a contention that the RCMA did not include a capital-credit promise by the Government. Opp. 12-16. The Federal Circuit, however, at least accepted (as the Government agrees), and is better read as having affirmatively concluded, that the Government breached the RCMA when it altered the regulatory treatment of capital credits. Pet. App. 19a ("Recital G and § 1 [of the RCMA] include the government's promise that SCH and SoCal will be able to account for $217.5 million in capital credits as part of its regulatory capital."); *id.* at 20a ("the incorporation of the capital credit

[1] The Government misstates the amount at stake: it says that "the trial court awarded over $90 million to petitioners" (Opp. 8), when the award to petitioners was just over $28 million (App. 123a; *see* Pet. 11).

promise into the terms of the RCMA"). The Federal Circuit thus adopted a legal rule that limits damages for a breach, and it is that rule, which the Government struggles to explain and support (*see* pages 4-7, *infra*), that contract parties and courts now must follow.

The Federal Circuit was correct in declining to adopt the Government's argument that the RCMA contains no capital-credit promise. RCMA § 1 in terms says: "regardless of any changes in the method of calculating regulatory capital or the items includable in such calculation, the $217.5 million of assistance from the CORPORATION [Government] shall be includable in capital for purposes of determining whether the NEW ASSOCIATION [SoCal] has maintained its regulatory capital" at the 3% level § 1 requires. Pet. App. 182a. RCMA § 4 requires *petitioners* (the "ACQUIRING GROUP") to guarantee that level and also to maintain their equity ownership, and RCMA §§ 5 and 7 require *petitioners* to forfeit their stock in certain circumstances if their equity or the capital level falls too much. Pet. App. 183a. The recitals preceding those provisions, moreover, not only state that the Government "has agreed" to the capital-credit regulatory treatment (Recital G), but refer to "the *mutual promises contained herein*" (Recital F) and place the RCMA at the very core of the overall transaction by stating that the Government's provision of financial assistance was contingent on receiving the promises in the RCMA, from petitioners as well as others (Recital E). Pet. App. 181a (emphasis added).

The Government's capital-credit assurance can only rationally be viewed as an enforceable promise under the RCMA—a "manifestation of intention" that "justif[ies] a promisee in understanding that a commitment has been made." *Restatement* § 2 & Comment b; *id.* §§ 3, 4, 202. As a common-sense matter, petitioners' RCMA commitments of their money, time, and reputations made no sense whatever without the Government's capital commitment. *United States v. Winstar*

Corp., 518 U.S. 839, 863 (1996) (plurality). Textually, moreover, under the RCMA's express characterization of the "*mutual promises contained herein*" (Recital F), the Government's capital-credit guarantee *had* to be an enforceable promise, because *there is no other Government promise in the document*. That fact alone disproves the Government's effort (unsupported by citation) to limit the RCMA § 1 "provided" commitment to the thrift and holding company (Opp. 13)—which is also wrong, legally and factually, on additional grounds as well. Thus, even if the Government's capital-credit commitment were viewed simply as benefiting the thrift and its holding company, black-letter law entitles petitioners to enforce it. *Restatement* § 305 Comment a ("[t]he promisee of a promise for the benefit of a beneficiary has the same right to performance as any other promisee"). And, in any event, the § 1 commitment runs to petitioners themselves, because RCMA §§ 4 and 7 put them on the line for the institutions' capital maintenance required by § 1, making clear that the Government's commitment was in exchange for petitioners' as well as the institutions' undertakings.[2]

2. On the merits, the Government strains to construct a justification for the Federal Circuit's damages ruling. Opp. 16-20. The various attempts ultimately rest on the same notion: that, because petitioners' *obligations* were limited under the RCMA, their damages must be limited to those obligations and cannot compensate them for their *opportunities* under the contract had it been performed. The Government offers this as another way of saying what the

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[2] The Government, while acknowledging that petitioners separately argued for breach of the RCMA capital-credit promise in the Federal Circuit, suggests that the brevity of the argument casts doubt on it. Opp. 16 n.4. To the contrary, the brevity reflects the simplicity of the point—which the Federal Circuit accepted, at least *arguendo*—as well as the need for space to address other more complex issues, including whether petitioners' contract went beyond the RCMA.

Federal Circuit said: that the breach-caused destruction of petitioners' property was not recoverable because the breached contract (the RCMA) did not require forfeiture (or initial acquisition) of that property. Like the Federal Circuit, however, the Government has cited not one authority for this limitation on contract damages—tacitly proving the novelty of the limitation on which the judgment below rests.

This limitation is not just unsupported but insupportable. By restricting protection of promisees' contract *opportunities* to their contract *obligations*, the Federal Circuit's and Government's new theory violates the core principle that distinguishes contract damages from tort and other damages. The essence of the well-established primary measure of contract damages, *i.e.*, expectation damages, is precisely to "give a plaintiff the full benefit of its bargain by compensating for forgone business opportunities." *East River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 873 (1986); *see Restatement* §§ 344, 347 & Comments a; R. Lord, *Williston on Contracts* § 64:2 (4th ed.) (promisee entitled to expected value of the contract if performed); E. Farnsworth, *Contracts* §§ 12.1, 12.9 (1982) (same, noting also UCC § 1-106(1)). The Federal Circuit's denial of damages, and the Government's defense of it, thus attack the very heart of contract-damages law, and the harmful consequences of the ruling are correspondingly large.

The RCMA bargain is plain. Petitioners made a continuing commitment—of their money (up to specified amounts), their time as directors and officers, and their reputations in the industry—to saving the thrift, a very risky proposition, benefiting the Government (which had no other bidders) by relieving it of an immediate liquidation liability. In exchange, petitioners received the Government's capital-credit commitment—without which it made no sense for petitioners to promise effectively to keep re-upping their investment each day after the April 30, 1987, RCMA—plus ownership of

what they might transform into a successful enterprise. The RCMA commitments, according to the RCMA itself, were central, not peripheral, to the whole transaction, for Recital E declares the Government's critical provision of financial assistance and indemnification to be conditional on those commitments. Pet. App. 181a. The basic rule of expectation damages guarantees petitioners the benefit of their bargain, and under standard contract law, those damages include the factually foreseeable destruction of their equity stake that was, in fact, caused by the Government's breach.

Two examples illustrate how far from settled law the Government has to reach. *First*: It suggests denial of relief because petitioners always faced a risk that they would have to forfeit their equity for the thrift to succeed. Opp. 18. This misses the critical point. Although contract parties always face risks that their enterprise will not succeed and they will suffer losses, contract law specifically protects against the causing of such business reversals and losses *by the actions of the other party breaching their promises in the contract.* Here, the Government's withdrawal of the capital-credit commitment, as the trial court found, is what caused petitioners' loss and thus renders the Government responsible. *Second*: The Government invokes the label "condition precedent" to describe its capital-credit commitment, Opp. 19, 21, as if that label defeated its liability for damages. This is sheer confusion. A "condition" in the Government's control, if not satisfied, might have relieved *petitioners* of *their* contract duties, but that is hardly the issue. The law of conditions has literally nothing to do with excusing non-performance by the party in control of the condition (let alone non-performance *after* the counterparty has performed, as petitioners had by committing their money, time, and reputations). *See Restatement* §§ 224-230.

The harmful consequences of the Federal Circuit's novel limitation on damages are evident. *See* Pet. 25-26. The rul-

ing will raise transaction costs in contracting, as parties must struggle to anticipate possible losses, write them into the contract, and perhaps even coordinate particular losses with particular obligations. It also will raise the contract price to the Government, as the increased transaction costs, plus the increased litigation costs and risk of limited recovery, must be compensated by higher payments in the contract. Not only private parties, but the Government itself will suffer. The Government does not dispute these evident harms—which will occur long before and outside the glare of further appellate rulings. Review is therefore needed now.

3. The ruling below also creates a deep intra-circuit conflict on a fundamental matter within the Federal Circuit's unique jurisdiction, an accepted basis for review. *See Cardinal Chem. Co. v. Morton Intern., Inc.*, 508 U.S. 83, 89 (1993).[3] Numerous Federal Circuit decisions articulate and apply, and award damages under, the ordinary expectation damages principle, without the novel restriction of damages to the plaintiff's contract obligations that was created and applied here. *See* Pet. 22-24. In the *Winstar* setting, both *Bluebonnet Sav. Bk. v. United States*, 266 F.3d 1348 (Fed. Cir. 2001), and *La Van v. United States*, 382 F.3d 1340 (Fed. Cir. 2004), do so. The Government tries to distinguish those decisions only by once again disputing that it made a promise to petitioners in the RCMA, a position the Federal Circuit here, for good reason, did not accept. Review is therefore

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[3] The United States has explained that, because of the Federal Circuit's special jurisdiction, "this Court has recognized the need for plenary review of Federal Circuit decisions that present issues of substantial importance. See, e.g., *United States v. Hill*, 113 S. Ct. 941, 945 (1993); *United States v. Goodyear Tire & Rubber Co.*, 493 U.S. 132, 138 (1989); *United States v. American Bar Endowment*, 477 U.S. 105, 109 (1986)." Petition for Certiorari at 14, in *United States v. IBM Corp.*, 517 U.S. 843 (1996), at 1995 WL 17013668.